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## **DEPARTMENT OF AGRICULTURE**

### **Food and Nutrition Service**

#### **7 CFR Parts 271, 272, 273, 274, and 278**

**[FNS-2016-0003]**

**RIN: 0584-AE45**

#### **Supplemental Nutrition Assistance Program: Photo Electronic Benefit Transfer (EBT) Card Implementation Requirements**

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Final rule.

**SUMMARY:** The Food and Nutrition Service (FNS) is updating the Supplemental Nutrition Assistance Program (SNAP or “Program”) regulations to set implementation parameters, prerequisites and operational standards required of State agencies that intend to implement the photo Electronic Benefit Transfer (EBT) card option provided under Section 7(h)(9) of the Food and Nutrition Act of 2008 (“the Act”). The updated regulations establish procedures to ensure State implementation is consistent with all Federal requirements as they relate to photo EBT cards, including establishing procedures to ensure: any other appropriate member of the household or authorized representative (including any individual permitted by the household to purchase food on its behalf) who is not pictured on the photo EBT card may use the card; placing photos on EBT cards does not affect the eligibility process and does not impose additional conditions of eligibility or adversely impact the ability of appropriate household members to access the

nutrition assistance they need. Failure by a State agency to adhere to the provisions of this rule may result in penalties, including loss of federal funding. The rule will also codify several other program updates to reflect the current operations of the program.

**DATES:** This rule is effective [insert date 30 days from date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Vicky T. Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302. Ms. Robinson can also be reached by telephone at 703-305-2476 or by email at Vicky.Robinson@fns.usda.gov during regular business hours (8:30 a.m. to 5:30 p.m.), Monday through Friday.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

#### ***Purpose of the Regulatory Action***

This rule finalizes the provisions of a proposed rule published on January 6, 2016 (81 FR 398). With this final rule, FNS is amending the SNAP regulations at 7 CFR parts 271, 272, 273, 274 and 278 to codify and expand guidance that was issued December 29, 2014, requiring State agencies that intend to implement the photo EBT card option under Section 7(h)(9) of the Act, 7 U.S.C. 2016(h)(9), to submit a comprehensive Implementation Plan that addresses certain operational issues to ensure State implementation is consistent with all Federal requirements and that program access is protected for participating households.

In particular, this rule clarifies that the State option to place a photograph on an EBT card is a function of issuance. Pursuant to this, State agencies are prohibited from having photo EBT card requirements that affect the household's eligibility or the certification process. Moreover, this rule clarifies the right of all household members and any other individual permitted by the household to use the EBT card to purchase food or meals on behalf of the household, regardless of whether their photo is on the card, and further defines the responsibility of State agencies to ensure that retailers understand photo EBT requirements when processing transactions involving SNAP.

### ***Summary of the Major Provisions***

The final rule removes the provision concerning multiple card usage at the point of sale and incorporates the following minor modifications for clarity:

- Language added to clarify that States must issue both the benefits and EBT card without delay in accordance with SNAP application processing standards, whether or not a photo is on the card.
- Language added to clarify that expedited households are exempt from a mandatory photo EBT card policy until the next recertification.
- Language added to clarify that States may not charge households card replacement fees for any card issued as part of the implementation of the photo EBT card option.
- Language added to clarify that households have the right to permit other individuals to use the household's EBT card on an ad hoc basis for the purpose of

attaining assistance with purchasing food, whether or not the State has a photo EBT requirement.

- Language added to specify that Implementation Plans must also include the text that will be added to EBT cards to state that anyone with a valid PIN may use the card even if he/she is not pictured on the card; the procedures for opting into a voluntary photo EBT card policy and documenting that a household voluntarily chose to have a photo on its EBT; and communication plans for educating and notifying clients and retailers of the State's photo EBT card policy.
- Language added to clarify that State agencies shall provide FNS additional information upon request or as may be required by other guidelines established by the Secretary to conduct ongoing evaluations.
- Clarified in preamble that State responsibilities for retailer education on photo EBT cards is limited to the implementation phase. For newly authorized retailers, FNS will update retailer training materials as the agency would for any new requirements affecting SNAP retailer operations.
- Removal of the provision requiring SNAP retailers to ask for identification from SNAP customers using three or more EBT cards at once for purchases and to report that information to the USDA Office of Inspector General (OIG) Fraud Hotline if fraud is suspected.

## **II. Background**

The Act and SNAP regulations give states the option to require that EBT cards contain a photo of one or more household members. However, implementation involves

complex legal, operational, and civil rights considerations; if not well planned, it can inhibit benefit access for eligible participants which could violate federal law.

There have been significant issues with recent attempts to place photos on EBT cards, including confusion at stores where clients have been turned away because of misunderstanding/misapplication of policy; confusion among clients regarding who can use the card in the household because of the photo on the card; and confusion among State workers regarding proper policy for certain cases such as child only cases. As a result, FNS issued guidance to State agencies in December 2014 to provide clear parameters for implementation and ongoing operation of the photo EBT card option. On January 6, 2016, FNS published a proposed rule in the Federal Register (81 FR 398), in which the Agency proposed to amend SNAP regulations at 7 CFR Parts 271, 272, 273, 274 and 278 to codify the FNS guidance.

The rule proposed that States submit a comprehensive Implementation Plan to FNS for approval prior to implementing the photo EBT card option, and that the Implementation Plan include certain operational components to ensure State implementation is consistent with all Federal requirements and that program access is not inhibited. Because implementation of the photo EBT card option requires substantial resources, FNS proposed that State agencies also demonstrate that they meet minimum performance standards so FNS could evaluate whether SNAP households receive timely, accurate, and fair service before the State could implement the photo EBT card option. The rule also proposed to clarify that the State option to place photos on EBT cards is a function of issuance and not a condition of eligibility. In addition, the proposed rule included point-

of-sale verification provisions to address recently identified violations by retailers and others buying and using multiple cards and Personal Identification Numbers (PINs) to stock their shelves.

FNS solicited comments on the proposed rule for 60 days, ending March 7, 2016. The Agency received 84 comments from various entities, including: 56 advocacy organizations; 11 individuals that identified as SNAP participants; 8 individuals that did not identify with a State agency or organization; 4 grocer associations; 3 State/local government agencies; and 2 Electronic Funds Transfer (EFT) organizations.

### **III. Summary of Comments and Explanation of Revisions**

The comments FNS received were overwhelmingly supportive of the proposed rule, in general, and, in particular, of the recognition that photo EBT is a function of issuance that cannot impact households' SNAP eligibility. With regards to the photo EBT card implementation and monitoring provisions in the proposed rule, respondents expressed appreciation for the effort taken by FNS to protect SNAP participants' access to benefits, to prevent challenges in photo EBT implementation in the future, and to ensure that Federal reimbursement dollars are not wasted in the administrative costs of implementing a complex State option. Many respondents provided suggestions for strengthening client protections even further and for imposing stricter requirements on State agencies wishing to implement the photo EBT card option, such as requiring additional client exemptions from the photo, establishing a specific level for each performance metric that reflects a State's commitment and ability to provide timely assistance to eligible households, establishing clearer requirements for client and retailer

education, and requiring the State agency to seek input from key stakeholders prior to and after implementation.

At the same time, some of the respondents supporting the rule expressed opposition to the general principle of placing photos on EBT cards because they believe it stigmatizes people receiving government assistance, subjects them to unequal and greater scrutiny by store clerks, wastes taxpayer dollars, and is at odds with the rules of the commercial payments world, which EBT is intended to follow. Some respondents also felt that allowing States to withhold benefits is inconsistent with the statutory intent that photo EBT cards are a function of issuance, not certification.

Four respondents expressed overall opposition to the rule, believing that the rule both in form and in effect restricts States' ability to exercise the photo EBT card option and supported, instead, requiring mandatory placement of photos on EBT cards and/or not restricting States' ability to do so. Furthermore, several other respondents expressed significant concerns with the proposed verification and reporting requirements of retailers for customers paying with multiple EBT cards at the point-of-sale.

Because of the strong support for the rule and based on FNS' authority under Section 11 of the Act for monitoring and oversight of SNAP, FNS is largely adopting the proposed rule as a final rule, with some clarifying changes regarding the photo EBT card provisions in response to comments. Also, in response to comments, FNS is eliminating the verification requirement with respect to multiple card usage at the point-of-sale.

Below is further discussion of the most illustrative comments FNS received.

#### ***State Agency Requirements for Photo EBT Card Implementation***

Minimum requirements - Several respondents, which included nine advocates and seven clients, requested that FNS not allow a State to commence with photo EBT plans if they cannot process household applications and issue benefits on time. The proposed rule specified that, prior to implementation, State agencies must demonstrate successful administration of SNAP based on SNAP performance standards, including application processing timeliness for both the 7-day expedited processing and the 30-day processing standards. Pursuant to the proposed provision at 7 CFR 274.8(f)(1), which remains unchanged in the final rule, States must demonstrate to FNS successful administration of SNAP based on SNAP performance standards to be eligible to implement the photo EBT card option, including successfully processing household benefits within the required timeframes.

Nine advocacy organizations also wanted FNS to establish specific benchmarks for the performance metrics States must meet in order to implement the photo EBT card option. The respondents suggested it is critical that there be a specific performance level that must be established and maintained for each metric, one that reflects a State's commitment to providing timely assistance to eligible households, and its ability to do so. Respondents also wanted FNS to clarify that the performance metrics will be based on performance and not on improvement in order to best protect SNAP applicants and participants. One respondent suggested that the final rule should require positive performance in each of the three years preceding approval and implementation of the photo EBT system.

While FNS understands advocates' desire for specific thresholds with the intent of being able to readily exclude poor performing States from being allowed to implement



the photo EBT card option, FNS has come to the conclusion that such a narrowly defined approach could unduly limit FNS' ability to evaluate a State's overall capacity for properly implementing the photo EBT card option. Instead, FNS believes that assessing the State's overall program performance would result in a more effective and accurate determination of a State's capability to implement a photo EBT card option with minimal adverse impacts to clients. The overall picture would, of course, take into account individual measurements, such as those already established through current FNS policy and the Quality Control (QC) process. The Agency will use many of these same standards, as specified at 7 CFR 274.8(f)(1), to measure State performance levels for the purpose of approving photo EBT card implementation. However, it's possible a State could be meeting such standards and still be performing poorly overall or in other areas not included in current standard measurements. For this reason, it is important for FNS to maintain some flexibility to be able to address situations in which unforeseen performance issues would inhibit proper photo EBT card implementation.

The final rule at 7 CFR 274.8(f)(1) remains unchanged.

Voluntary program - Four advocacy organizations wanted FNS to require States to memorialize any agreement to "opt-in" to a voluntary photo EBT card policy with written documentation signed by the household that makes clear that it understood it had a choice and decided to opt-in. The provisions at 7 CFR 274.8(f)(14)(iii) list general types of information FNS expects in the Implementation Plans, including a description of the card issuance procedures and how the State will obtain photographs. Although FNS is not specifying in regulations how State agencies must meet the requirement to have households opt in rather than opt out of a voluntary photo EBT card policy, FNS is

adding, in response to comments, language in 7 CFR 274.8(f)(14)(iii) to require that the Implementation Plan include a description of the proposed procedures for opting into a voluntary photo EBT card policy and documenting that a household voluntarily chose to have a photo on its EBT card. Specifically, States will need to show how the opt-in process will protect clients' right to not have a photo on the card in voluntary programs. 7 CFR 274.8(f)(14)(iii) is changed accordingly.

Serving clients with hardship – Several respondents, including 26 advocacy organizations and 8 clients, wanted FNS to expand the minimum required exemption criteria for mandatory photo EBT programs in the proposed 7 CFR 274.8(f)(4). In particular, many respondents wanted FNS to mandate hardship and “good cause” exemptions to address applicants residing in rural areas, applicants that have a hardship that makes it difficult for them to travel to have their photo taken for the card, applicants with caregiving duties, as well as veterans, applicants with refugee or asylee status and those who face low-literacy barriers. Based on the experiences of the other States with existing photo EBT policies, FNS determined that there is sufficient basis to mandate exemptions for the most vulnerable populations. However, with respect to more general hardship or “good cause” exemptions, FNS has decided to remain consistent with mandatory exemptions required for other areas of the Program. For hardship cases that are not already exempt under State policy, FNS is clarifying at 7 CFR 274.8(f)(5) that State agencies must have a process in place to address such situations on a case-by-case basis. Therefore, in the final rule, FNS is maintaining States' discretion to establish their own hardship exemptions beyond the minimum required exemptions for a mandatory photo EBT program based on State-specific needs and 7 CFR 274.8(f)(4) is adopted as is.

Issuance of the photo EBT card – One advocacy organization wanted FNS to specify that if a household meets expedited criteria, a “photo-less” card must be issued to the entire household without delay. FNS agrees that the proposed language at 7 CFR 274.8(f)(6) does not sufficiently reflect the preamble language to make expedited households exempt from mandatory photo EBT card policies until the next recertification. In other words, States must not issue a photo EBT card to expedited households even if they can do so within 7 days. Therefore, FNS is revising the regulatory language at 7 CFR 274.8(f)(6)(ii) to clarify that States must issue without delay benefits and a card without the photo to households that meet expedited criteria. A nonexempt household member may be required to comply at the next recertification.

One advocacy organization wanted FNS to clarify that States must issue both the benefits and card without delay for expedited households. In line with SNAP regulations at 7 CFR 274.2(b), benefits are not considered available until the State provides the household with an active EBT card and PIN, and benefits have been posted to the household's EBT account and are available for spending. Accordingly, FNS is adding clarifying language at 7 CFR 274.8(f)(6)(iii).

Card replacement fees – Five advocates suggested FNS clarify that State agencies may not charge households a replacement card fee when replacing non-photo EBT cards with photo EBT cards during implementation or for putting additional text on the card related to the use of photo EBT cards. State agencies are currently permitted to charge card replacement fees when a card has been lost, stolen, or damaged and the requirements of 7 CFR 274.6(b) have been met. The issuance of a photo EBT card is not a replacement of a lost, stolen or damaged card, so replacement fees would not apply.

However, FNS will clarify in 7 CFR 274.8(f)(6)(vi) that States are prohibited from counting any card issued as part of the implementation of the photo EBT card option against the household with respect to both the card replacement threshold and replacement fees under 7 CFR 274.6(b).

Prorating household benefits - Four advocacy organizations and one individual viewed withholding benefits for noncompliance with a photo EBT card requirement as a violation of the Act since photo EBT cards are a function of issuance, not certification, and, therefore, should not be allowed. One State agency viewed the proration and withholding requirement for mandatory photo EBT cards unduly burdensome, making it impractical to compel compliance. The Act clearly provides States with the option to mandate a photo on EBT cards. FNS has determined that States may enforce a mandatory policy by withholding issuance of the non-complying household member share of benefits only, but not by denying certification or withholding benefits for the entire household.

Household compliance – Sixteen respondents, including advocacy organizations and clients, expressed concern that households be given sufficient time to comply with a photo EBT card requirement. Respondents suggested that FNS consider applying a standard for missed photo appointments similar to the regulatory requirements at 7 CFR 273.2(h)(1)(i)(D), relating to missed interviews, to households that do not comply with the first appointment to get their photograph taken. FNS does not believe that the requirements surrounding missed eligibility interviews are appropriate for the purposes of allowing clients sufficient time to obtain a photo for the EBT card because those requirements do not provide the flexibility that must be part of a State's photo EBT card

policy. States must describe the process for obtaining the photos in the Implementation Plan. The language in 7 CFR 274.8(f)(6)(i) requires that the time provided to households to come in to take a photo be sufficient and reasonable, and also specifies that obtaining the photo must not impact processing standards at 7 CFR 273.2(g) and (i). The process should be flexible with multiple opportunities for providing a photo, such as allowing clients to come in on a drop-in basis. If the non-exempt, non-compliant household member does not provide a photo within 30 days of applying, the State must still issue the EBT card and provide a pro-rated amount of benefits for the other exempt, or compliant household members as provided in 7 CFR 274.8(f)(7). When the non-exempt household member comes into compliance with the photo requirement, the household gets the remaining benefits back for all previous months as provided in 7 CFR 274.8(f)(8). As mentioned, expedited households are exempt from the photo EBT card policy until the next recertification. As stated in 7 CFR 274.8(f)(8), withheld benefits are expunged after one year in accordance with 7 CFR 274.2(h)(2). With one year to come into compliance, FNS believes the proposed regulations already protect households from being negatively impacted if circumstances delay the head of household's ability to provide a photo. It is also important to highlight that this only applies to mandatory implementation as voluntary participants cannot be required to be photographed under any circumstance. 7 CFR 274.8(f)(6) remains unchanged with respect to providing households sufficient time to comply with a photo EBT card requirement.

Expungement - One advocacy organization wanted FNS to exempt benefits withheld for noncompliance from expungement until the household becomes compliant. Because it is possible that some households may never come into compliance, FNS does

not believe it is practical to require States to hold the benefits and maintain them as a SNAP obligation in perpetuity. FNS continues to believe that one year is sufficient time for the household to come into compliance before the State can start expunging withheld benefits. Furthermore, all withheld benefits cannot be expunged at once. Benefits must be expunged at the allotment level just as they are under the regular expungement process at 7 CFR 274.2(h)(2). Similarly, the noncompliant household member continues to accrue withheld benefits for as long as they are certified. For example, if a certified member of a household does not comply with a mandatory photo policy for 14 months and then becomes compliant, the State must return 12 months of benefits to that household. In other words, when a noncompliant member of a household becomes compliant, that household is entitled to all the benefits withheld in accordance with 7 CFR 274.8(f)(7), up to a maximum of 12 months' worth of benefits.

Therefore, the final rule at 7 CFR 274.8(f)(8) remains unchanged to ensure benefits withheld for noncompliance are treated in accordance with the same timeframe used for handling all expungements under 7 CFR 274.2(h)(2). If the noncompliant member comes into compliance, the non-expired benefits must be issued within two business days of when the client has their photo taken by the State agency. Any action to withhold benefits from issuance is subject to fair hearings in accordance with 7 CFR 273.15.

Household and authorized representative card usage - Two advocacy organizations would like the regulations to be more explicit in giving households the right to permit individuals on an ad hoc basis to use the household's EBT card on the household's behalf to purchase food or meals, whether or not their State has a photo EBT

policy. While 7 CFR 273.2(n)(3) and 274.7(a) already allow households to select other persons to use their Program benefits to purchase eligible food, FNS agrees that making this ability more explicit in the photo EBT card regulations would be helpful in ensuring that States do not attempt to place undue burdens on households by requiring a formal authorization process to identify individuals who may help the household purchase food. Current regulations allow any household member or non-member selected by the household to purchase food with the household's EBT card on the household's behalf. These non-members are not required to be formally designated and States shall not require households to provide the State information regarding individuals making purchases permitted by the household on an ad-hoc basis.

However, clients also need to understand that neither the State nor FNS is responsible for any benefits lost as a result of a client freely giving out the household's PIN to another individual. Therefore, FNS is amending language at 7 CFR 274.8(f)(9) through (11) to similarly specify that individuals permitted by the household to purchase food or meals on their behalf are entitled to use the card.

As it continues to be illegal for anyone to sell, transfer, acquire, receive or possess program benefits for the purpose of defrauding the government or individuals certified to receive benefits, clients are not allowed to give their EBT card and/or PIN to another individual for any other purpose other than to purchase food or meals for the certified household only.

Client and retailer training – Several respondents, including 10 clients, six advocacy organizations and one State agency wanted to ensure that client and retailer training and education materials be written in clear and conspicuous language, with some

respondents specifying font, type and reading level. Some respondents also wanted information regarding exemptions, benefits being prorated, the ability for anyone in the household to use the card, etc., added to the minimum information specified in the proposed rule. While FNS shares the respondents' concerns that clients and retailers receive all the necessary information to ensure compliance with SNAP regulations, FNS does not believe such specificity is necessary. Too much information can have the unintended consequence of overwhelming the recipient with the information, hindering both accessibility and understanding of the information. Instead, FNS will assess the clarity in wording and appearance of photo EBT card training and education materials during the overall implementation approval process. Therefore, FNS is leaving the information required for client and retailer training and education materials unchanged in the final rule at 7 CFR 274.8(f)(10) and (11).

Retailer education and responsibilities - Two advocacy organizations and two State agencies opposed the provisions in the proposed rule that would shift responsibility for retailer education and accountability from FNS to the States. They were concerned that the resources and time necessary to perform retailer outreach effectively is beyond the capacity of many State agencies, which already confront limited resources. While it is true that FNS oversees retailer policy and compliance, States implement the photo EBT process at their own option. The Act clearly requires States that choose to do so to be responsible for ensuring that any other appropriate member of the household or authorized representative of the household may utilize the card, which includes ensuring that the State photo EBT policy is understood by all stakeholders. Furthermore, States have been directly involved with retailer participation with respect to equipping retailers



with point-of-sale devices, training them on EBT requirements and procedures, and providing customer service on EBT. Therefore, having States be responsible for retailer education with respect to the photo EBT cards is not inconsistent with past or current retailer involvement at the State level and fulfills the Act's requirement.

Three advocacy organizations wanted FNS to specify that States must educate not only current retailers but any new retailers that come into the Program, while respondents, in general, recommended that FNS incorporate guidance on the proper handling and acceptance of photo EBT cards into the initial training materials for newly authorized stores and any refresher training produced for stores. Because of the divergent comments regarding whether or not States should be given retailer education responsibilities, FNS is limiting State responsibilities regarding retailer education responsibilities on photo EBT cards to the implementation phase. For newly authorized retailers, FNS will maintain its current retailer education responsibilities, including updating retailer training materials as the Agency would for any new requirements affecting SNAP retailer operations. As a result, the proposed retailer education and responsibility provisions remain unchanged in the final rule at 7 CFR 274.8(f)(11).

### ***Implementation Plan***

There were several areas where respondents recommended stricter parameters and/or additional or more specific requirements. In many of these instances, FNS believes States should continue to be allowed some discretion, consistent with other areas of the Program. Furthermore, many of the comments involved general concerns with ensuring States make it clear how they would implement certain aspects of the photo

EBT card option, as well as make the policies clear to clients. To that end, FNS is specifically including communication plans for educating and notifying clients and retailers to the language at 7 CFR 274.8(f)(14)(iii).

Ultimately, FNS does not believe it would be beneficial to be too specific with regard to each requirement that is included in the Implementation Plan. Comments received on the Implementation Plan provisions at 7 CFR 274.8(f)(14) are summarized as follows:

Demonstrate a genuine problem that will be rectified by the photo on the EBT card - Six advocacy organizations wanted States to be required to prove the cost effectiveness and efficiency of a photo EBT program, and/or demonstrate that the photo EBT policy will remedy a specific problem. FNS believes such a showing is not required and is unduly burdensome on a State.

Stakeholder input – Ten advocacy organizations and one grocer association wanted FNS to require States to seek and include feedback from other stakeholders, such as anti-hunger, client, or related advocacy groups, EBT vendors, and grocer associations, in the Implementation Plan. FNS agrees that it would benefit States to obtain input from organizations that might have further insight into on-the-ground operations and would highly encourage it. While States are not required to collaborate prior to or after implementation of a regulatory requirement, FNS believes obtaining feedback from stakeholder organizations and/or including them in the State's efforts to communicate effectively with clients and retailers is invaluable, and FNS's evaluation of the Implementation Plan will take into consideration any such collaboration that has influenced development of the plan. For example, as part of the communication plan, States should identify any organizations that will be assisting the State with developing

and/or distributing materials and information, as well as indicate any collaboration with and input obtained from stakeholders in the development of the communication plan to clients and retailers. As a result, FNS is adding language at 7 CFR 274.8(f)(14)(iii) to indicate that States must include information regarding any stakeholder collaborations in the Implementation Plan as well.

Limited English Proficient (LEP) SNAP clients - Four advocacy organizations wanted Implementation Plans to detail the State's training plan for LEP clients. They also asked that examples of letters and other materials communicating the policy to clients and retailers should include appropriate translations. FNS agrees with the spirit of this recommendation, and notes that the photo EBT card materials and information are subject to the language requirements in 7 CFR 272.4(b) regarding translation and interpretation, and States are prohibited from unlawfully discriminating against any applicants or participants as specified in 7 CFR 272.6(b)(1). In addition, 7 CFR 274.8(f)(14)(v) requires States to demonstrate how the photo EBT card materials comply with civil rights laws. FNS will review States' Implementation Plans to ensure that SNAP recipient training, materials, and information provide meaningful access to LEP individuals and conform to the requirements of Title VI of the Civil Rights Act of 1964. FNS will also obtain translations of all materials that will be used to inform clients, retailers, and other stakeholders. For clarification purposes, FNS is referencing language requirements and civil rights laws at 7 CFR 274.8(f)(14)(iii) and (v), respectively, in the final rule.

Retroactive implementation plans - Two grocer associations and two advocacy organizations wanted FNS to require States with current photo EBT programs to

retroactively submit Implementation Plans. FNS is actively involved in ensuring that the current photo EBT card programs are meeting all FNS requirements. FNS believes that the efforts in those States should be focused on correcting any compliance issues rather than developing an implementation plan for a program that is already operating, so FNS will not be requiring those states to submit an Implementation Plan.

Disaster Plan – One grocer association suggested that FNS require States to address the use of photo EBT cards in their disaster plans. FNS strongly encourages States choosing to place photos on EBT cards to plan for and develop procedures for how the State will issue EBT cards in the event of a disaster. FNS is not requiring States to include processes for addressing photo EBT cards in their disaster plans because Section 5(h)(3)(B) of the Food and Nutrition Act gives the Secretary the authority to adjust issuance methods to be consistent with what is practicable under actual conditions in the affected area.

Conditional Approval of Implementation Plan – FNS is also clarifying at 7 CFR 274.8(f)(14)(i) that if a State's Implementation Plan is not sufficient for successful implementation of the photo EBT card option, FNS may issue a denial or an approval subject to conditions.

### ***Post-implementation assessment***

One advocacy organization specifically requested that FNS expand the data collected as part of the post-implementation assessment and evaluation to include the types of households impacted by the State's photo EBT card policy, not just the numbers or percentages, in order to help identify a group/type of household member that needs to be

exempted from the policy. Other respondents more generally suggested that FNS monitor the impact on various groups as part of ongoing monitoring provided for in 7 CFR 274.8(f)(17). FNS notes that many vulnerable groups are already exempt from mandatory photo EBT card policies under 7 CFR 274.8(f)(4). These groups include, at a minimum, the elderly, the disabled, children under 18, homeless households, and victims of domestic violence. States may also establish additional exemptions. Therefore, FNS believes that the value gained from requiring States to obtain data on these groups would not be substantial. As a result, the minimum information required in the post-implementation report remains unchanged in the final rule.

#### Ongoing monitoring

FNS received several comments in response to questions posed in the proposed rule asking how FNS should verify appropriate implementation on an ongoing basis, and whether there is other data that should be required from States on an ongoing basis and how frequently States should be required to report. Respondents suggested several areas for ongoing monitoring such as tracking the impact of photo EBT policies on LEP households, the elderly, individuals with disabilities, and non-applicant heads of households; tracking client complaints; seeking advocate feedback on an ongoing basis; and periodically surveying stores after implementation to validate that the photo EBT requirements are understood. Respondents also suggested annual reporting and more frequent reporting during the first year of photo EBT operations. While FNS understands the desire for more detailed data, unfortunately, such data are not readily available to the States or reliable because they are not collected in any systematic way.

Nine advocacy organizations wanted FNS to stipulate that any State agency which decides to implement the photo EBT card option must *continue* to meet metrics set forth by the Department or suspend photo EBT. The proposed provisions at 7 CFR 274.8(f)(17)-(18) stipulate that FNS would continue to monitor and evaluate the operation of the photo EBT card option and, should there be problems with the State's implementation, FNS may require corrective action by the State. If that were to fail, FNS would consider other possible actions, including suspension of the States' photo EBT policy. As with all SNAP statutory, regulatory, and policy provisions, FNS has established processes for ensuring States are meeting SNAP requirements, such as through the Management Evaluation (ME) reviews. FNS intends to follow these same processes with respect to the photo EBT card option. Should FNS find that a State is not meeting any of the SNAP performance standards after implementation, the State's photo EBT card policy would be examined to determine its impact on any deficiencies found and whether the photo EBT card policy and implementation should be included in the appropriate actions to remedy the situation.

Two advocacy organizations suggested FNS classify any adoption of photo EBT cards as a major systems change so that it automatically requires the State to collect the data specified at 7 CFR 272.15. Conversely, two individual respondents and one State agency expressed concern that the proposed reporting requirements were excessively burdensome to State agencies and that the rule provided seemingly unbounded discretion to the Secretary for ongoing monitoring.

FNS appreciates the thoughtful feedback respondents provided. Although Section 11 of the Act provides the Secretary with broad authority for the monitoring and

oversight of SNAP, FNS understands that some specific parameters with regard to ongoing monitoring of the photo EBT option would be helpful for all stakeholders involved. FNS has determined that more specific requirements would be best addressed through separate guidance to allow for flexibility. With respect to classifying the photo EBT card option as a major change, FNS determined prior to publishing the Major Change rule (81 FR 2725 (January 19, 2016)) that it would not be the appropriate process for implementing photo EBT card operating standards because major changes, as defined in the rule, specifically relate to SNAP certification processes, and how process or technology changes impact the ability of SNAP applicants and participants to interact with the State agency or be certified for benefits. The photo EBT card option is a function of issuance, not certification, and therefore, cannot impact whether or not a household is eligible for SNAP participation.

As with comments received regarding the Implementation Plan requirements and performance standards, FNS will consider comments on the proposed rule regarding ongoing monitoring in the development of any criteria or further guidance for evaluating States' photo EBT card policies on an ongoing basis. The final rule clarifies at 7 CFR 274.8(f)(17) that State agencies will be required to provide FNS additional information upon request to conduct ongoing evaluations.

### ***Modifying implementation of photo EBT card option***

In response to FNS' specific question seeking comments on whether a State should be required to stop or suspend placing photos on EBT cards if the State agency fails to establish procedures to ensure that all members of the household or any

authorized representatives are able to use the card, four advocacy organizations supported FNS taking action to suspend a State's Photo EBT card policy. One respondent urged FNS to establish and enforce a penalty that is real and meaningful when States ignore or defy Federal enforcement, and to render a State ineligible to continue its photo EBT card policy if it is found to have a negative impact on a State's ability to process SNAP applications and issue benefits in a timely manner. Another respondent suggested that review of the photo EBT card policies be added as a part of the State Agency Management Evaluation (ME).

In the absence of a concrete alternative process for assessing and imposing penalties for noncompliance with the photo EBT card requirements or for other deficiencies that may be the result of the State's photo EBT card policy, FNS will continue to follow existing procedures for evaluating and addressing situations when a State agency is not meeting standards contained in the Act, regulations, and/or the State Plan of Operation, including procedures for ME reviews, corrective actions, and suspension/disallowance of federal administrative funding. As a result, the final rule remains unchanged with regard to State noncompliance and penalties.

***Provisions regarding public posting of Implementation Plans, non-applicants, and retailer "testers"***

In the proposed rule, FNS posed other specific questions for comment. These questions involved whether there are concerns with posting approved Implementation Plans on the FNS public website, whether there was a potential benefit for allowing non-applicants to have their photograph taken under a voluntary implementation, and whether



stakeholders believe “testers” to be a worthwhile method for verifying appropriate implementation at authorized retailer locations. Ten advocacy organizations and two State agencies agreed with the rationale that approved Implementation Plans are public information and should be posted on the FNS website, and with prohibiting the taking of photos of non-applicants under a voluntary photo EBT card policy as proposed in 7 CFR 274.8(f)(3)(iii). One commenter suggested photographs of non-applicants be allowed only on alternate cards, where an alternate card is required by the state agency or requested by the household to be issued to a person who is not a member of the SNAP household. With regard to “testers,” respondents, in general, including six advocacy organizations, two grocers associations, one electronic funds association and one State agency, supported using the method to determine if any barriers have been created due to a State’s photo EBT card policy. However, the two grocers associations felt that the method should be used only if retailers were not subjected to any penalties for a poor outcome, while the State agency suggested the method be a State option, given the administrative costs involved, and only if retailers faced sanctions for failing to adhere to State or Federal policies.

Based on the above comments, FNS will not require States to use “testers” to verify proper implementation of photo EBT card policies at retailer locations. However, FNS encourages States to consider such a method when developing their overall strategies to ensure benefit access is not being held up or denied in the checkout lines. Therefore, the final rule remains unchanged with respect to posting approved Implementation Plans and prohibiting States from placing non-applicant photos on EBT

cards. With respect to “testers”, FNS is adding language at 7 CFR 274.8(f)(16)(i)(B) as an option for monitoring retailer compliance.

***Provisions beyond 7 CFR 274.8(f)***

Card Text – Twenty-two respondents, including 10 advocacy organizations, eight clients, two grocers associations, one individual, and one State agency, commented with respect to the proposed requirement at 7 CFR 274.8(b)(5)(ii) that States with photo EBT cards add text to all of the State’s EBT cards informing retailers and clients that all household members and authorized representatives, including individuals permitted by the household to purchase food or meals on its behalf, are allowed to use the EBT card even if their photo is not on the card or no photo is on the card. All respondents supported the requirements, but some wanted FNS to mandate specific wording to be placed on the cards rather than allow States to develop alternative language. Through the Implementation Plan approval process, FNS will look closely at the wording States intend to place on the cards to ensure that it is clear and conveys the appropriate information. Because the wording may be impacted by the space available on the card or may evolve over time based on subsequent State experiences, FNS is maintaining State discretion to propose their own text to place on EBT cards in the final rule. However, FNS will add language at 7 CFR 274.8(f)(14)(iii) to specify that the Implementation Plan must also include the text required by 7 CFR 274.8(b)(5)(ii).

Respondents also asked FNS to require States to place a 24-hour toll-free emergency number for retailers to call with questions about photo EBT requirements as well as a number for clients to call if they are being denied the right to use the household

photo EBT card. In addition, respondents suggested requiring a website on the card where retailers and clients could go for information on the State's photo EBT card policy. All States already have toll-free customer service numbers for both clients and retailers, some of which operate 24 hours. Many States also have or plan to have EBT client websites. Furthermore, these toll-free numbers and websites are already on many of the State's EBT cards. Again, FNS believes States should continue to have the same discretion in this area as they do for addressing all other EBT customer service issues. However, FNS will review photo EBT card Implementation Plans to ensure States will have a process in place for clients and retailers to get their issues related to the photo EBT program addressed as well as to ensure that clients and retailers are informed of this process.

Using multiple cards for SNAP purchases - In an attempt to address the existence of violating retailers and others buying and using multiple cards and PINs to stock their shelves, the proposed rule included a provision at 7 CFR 272.8(h) to require SNAP retailers to ask for identification from SNAP customers using three or more EBT cards at once for purchases and to report that information to the USDA OIG Fraud Hotline if fraud is suspected. Many concerns with this proposed policy were raised by the three grocers associations, one State agency and one advocacy organization. FNS agrees with respondents' concerns that such a requirement would present significant challenges for SNAP retailers for a variety of reasons. In particular, FNS agrees with a respondent's comment that it would not be prudent to require clerks, who are sometimes as young as 16 years old, to enter into what could potentially be a confrontational situation with a customer.

Alternatively, one respondent suggested that multiple card use not be allowed for a single transaction or by an individual for multiple transactions. Other respondents commented that there are circumstances where an individual could be using multiple EBT cards to legally purchase food for SNAP recipients and a limitation on the number of cards an individual may use at one time may create access issues for some recipients. Based on the comments received, FNS is removing this provision in the final rule and will consider prohibiting the use of multiple cards for future rulemaking. Although customers may use multiple EBT cards at the point of sale, retailers should continue to report any suspicious activity to the USDA OIG Fraud Hotline. The final rule is modified accordingly at 7 CFR 278.2(h).

#### **IV. Procedural Matters**

##### ***Executive Order 12866 and Executive Order 13563***

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated significant. Accordingly, the rule has been reviewed by the Office of Management and Budget. A summary of the regulatory impact analysis is included below. The full analysis is available through [www.regulations.gov](http://www.regulations.gov) in the docket for this rule (FNS-2016-0003).

### ***Regulatory Impact Analysis Summary***

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this final rule. The full RIA is included in the supporting documents of the rule docket at [www.regulations.gov](http://www.regulations.gov). The following summarizes the conclusions of the regulatory impact analysis.

Need for Action: This final rule would incorporate into regulation and expand on guidance that was issued December 29, 2014 to certain State agencies. Based on observed implementation to date, there is cause for concern about possible negative impacts of photo EBT programs on client access and civil rights, both as programs are first implemented and over time. This guidance requires States that intend to implement the photo EBT card option to submit a comprehensive Implementation Plan for FNS approval that addresses key operational issues to ensure State implementation complies with all Federal requirements and that program access is protected for participating households. In this final rule, the Department clarifies that the State option to place a photo on an EBT card is a function of issuance. Pursuant to this, State agencies are prohibited from having photo EBT requirements that affect the eligibility process. This includes ensuring that the photo EBT option is implemented in a manner that does not impose additional conditions of eligibility or adversely impact the ability of eligible Americans to access the nutrition assistance they need.

Benefits: The Department believes the provisions in this final rule provide qualitative benefits to State agencies, SNAP participants, and authorized retailers. The

Act and existing program regulations provide that States that implement a photo on the EBT card must establish procedures to ensure that any other appropriate member of the household or any authorized representative of the household may use the card. This final rule provides clear parameters for States wishing to implement photo EBT to ensure that State implementation is consistent with all Federal requirements and that program access is protected for participating households, which safeguard the rights of clients, provide training to staff, clients, and retailers, and improve program administration.

Costs: States choosing the photo EBT option may incur additional administrative costs, which may vary based on the size and scope of the State's operations and whether implementation of the photo EBT card option is mandatory or voluntary. Regardless of whether the option is mandatory or voluntary, all States that implement photo EBT cards will incur certain implementation costs to include: Preparing an Implementation Plan; communications and training for program staff, clients, and retailers; ongoing training costs to maintain an understanding of photo EBT card policies; programming costs for mandatory policies; and costs for the post implementation assessment, evaluation and ongoing monitoring. States with a mandatory photo EBT policy will also incur costs associated with prorating and storing benefits for noncompliant household members that choose not to be photographed. The Department estimates the total cost to be approximately \$9.3 million, shared 50/50 by the State and the Federal government, over five years, assuming six States choose to implement a mandatory photo EBT card policy. Costs would be lower if some or all of these States choose to implement voluntary, rather than mandatory, photo EBT card policies. The estimate of six States is based on information from State legislatures that are either currently considering or discussing the

possibility of considering such a policy. Given the projected timelines for these legislative actions, the Department assumes that the costs of implementing a photo EBT card policy will be phased in over a five year period, as all six States are unlikely to approve and implement the policy in the same year. The States that have already implemented photo EBT as a State option will not be required to retroactively submit Implementation Plans, but may continue to incur minimal costs associated with ongoing training and monitoring required for program staff, clients, and retailers.

### ***Regulatory Flexibility Act***

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, the Administrator of FNS certifies that this final rule would not have a significant impact on a substantial number of small entities. This final rule primarily impacts State agencies. As part of the requirements, State agencies would have to educate retailers about the photo EBT card. There will not be a substantial impact on small entities such as small retailers since the treatment of clients with EBT cards and photo EBT cards do not vary. Minimal changes will be required of retailers. Retailers will need to be aware that some clients may present photo EBT cards but clients shall not be treated any differently. This is not expected to create a burden on retailers.

### ***Unfunded Mandates Reform Act***

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule. This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$146 million or more in any one year. Thus, the final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### ***Executive Order 12372***

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.



### ***Federalism Summary Impact Statement***

Executive Order 13132, requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

The Department has determined that this rule does not have Federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a Federalism summary impact statement is not required.

### ***Executive Order 12988***

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This is intended to have retroactive effect in that State agencies that have already implemented a photo EBT card must meet all requirements of this final rule except the requirement to submit an Implementation Plan prior to State's planned implementation date. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

### **Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments."

Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

On February 18, 2015, the Food and Nutrition Service held an information session. During the information session, no comments were received on the proposal. Reports from these sessions are part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA offers these and similar opportunities, such as webinars and teleconferences, for collaborative conversations with Tribal leaders and their representatives concerning ways to improve rules with regard to their effect on Indian country on a quarterly basis as part of its yearly Tribal information sharing schedule.

The Food and Nutrition Service has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a Tribe requests consultation, the Food and Nutrition Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

### ***Civil Rights Impact Analysis***

FNS has reviewed this final rule in accordance with USDA Regulation 4300–4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of religion, age, race, color, national origin, sex, political beliefs, or disability. After a careful review of the rule’s intent and provisions and understanding the intent of this rule is to in part to protect the civil rights of clients, FNS has determined that this rule is not expected to adversely affect the participation of protected individuals in the Supplemental Nutrition Assistance Program. Discrimination in any aspect of the Program administration is prohibited by these regulations, according to the Act. Enforcement may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15. Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

### ***Paperwork Reduction Act***

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. Chap. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

In accordance with PRA, this final rule does not contain information collections that are subject to review and approval by OMB.

This rule requires State agencies to submit to FNS an Implementation Plan, a post implementation evaluation of the photo EBT implementation, and related ongoing measures. As the PRA requirements are applicable to collection of information from ten or more respondents, there are no information collection requirements that are subject to OMB review at this time. Should the number of estimated respondents reach ten or more, FNS will publish a notice for comment and submit the applicable requirements to OMB for review and approval.

### ***E-Government Act Compliance***

The Food and Nutrition Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

### **List of Subjects**

#### **7 CFR Part 271**

Food stamps, Grant programs-Social programs, Reporting and recordkeeping requirements.

#### **7 CFR Part 272**

Alaska, Civil rights, SNAP, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Unemployment compensation, Wages.

#### **7 CFR Part 273**

Administrative practice and procedure, Aliens, Claims, Employment, Food stamps, Fraud, Government employees, Grant programs-social programs, Income taxes,

Reporting and recordkeeping requirements, Students, Supplemental Security Income (SSI), Wages.

7 CFR Part 274

Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 278

Banks, banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, 7 CFR parts 271, 272, 273, 274, 278 are amended as follows:

1. The authority citation for parts 271, 272, 273, 274 and 278 continues to read as follows:

Authority: 7 U.S.C. 2011–2036c.

## **PART 271—GENERAL INFORMATION AND DEFINITIONS**

2. In § 271.2, revise the definition of Identification (ID) card to read as follows:

### **§ 271.2 Definitions.**

\* \* \* \* \*

*Identification (ID) card* means a card for the purposes of 7 CFR 278.2(j).

\* \* \* \* \*

## **PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES**

### **§ 272.1 [Amended]**

3. In § 272.1, remove and reserve paragraphs (g)(30) and (47).

## **PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS**

4. In § 273.2:

- a. Amend paragraph (a)(1) by adding to the end of the third sentence the words, “, including in the implementation of a photo EBT card policy” and by adding a new sentence between the third and fourth sentences.
- b. Amend paragraph (a)(2) by adding a new sentence before the last sentence.
- c. Amend paragraph (e)(1) by adding a new sentence after the third sentence.
- d. Amend paragraph (n)(2) by removing in the third sentence the words, “and on the food stamp identification (ID) card, as provided in 7 CFR 274.10(a)(1) of this chapter” and by removing the last sentence.
- e. Amend the first sentence of paragraph (n)(3) by removing the words, “ID card and benefits” and adding in its place the words, “EBT card”.

The additions read as follows:

**§ 273.2 Office operations and application processing.**

(a) \* \* \*

(1) \* \* \* The State agency's photo EBT card policy must not affect the certification process for purposes of determining eligibility regardless of whether an individual has his/her photo placed on the EBT card. \* \* \*

(2) \* \* \* States must meet application processing timelines, regardless of whether a State agency implements a photo EBT card policy. \* \* \*

\* \* \* \* \*

(e) \* \* \* State agencies may not require an in person interview solely to take a photo. \* \*

\* \* \* \* \*

**PART 274—ISSUANCE AND USE OF PROGRAM BENEFITS**

5. In § 274.8:

- a. Redesignate paragraphs (b)(5)(ii) through (iv) as paragraphs (b)(5)(iii) through (v), respectively, and add a new paragraph (b)(5)(ii).
- b. Add paragraph (f).

The additions read as follows:

**§ 274.8 Functional and technical EBT system requirements.**

\* \* \* \* \*

(b) \* \* \*

(5) \* \* \*

(ii) State agencies that implement the photo EBT card option in accordance with paragraph (f) of this section must print on the EBT cards the text “Any user with valid PIN can use SNAP benefits on card and need not be pictured.” or similar alternative text approved by FNS.

\* \* \* \* \*

(f) *State agency requirements for photo EBT card implementation*—(1) Minimum requirements. Prior to implementation, State agencies must be performing sufficiently well in program administration to be eligible to implement the photo EBT card option. Prior to implementation, State agencies must demonstrate to FNS successful administration of SNAP based on SNAP performance standards. Successful program administration will take into account at a minimum the metrics related to program access, the State’s payment error rate, the State’s Case and Procedural Error Rate, application processing timeliness, including both the 7-day expedited processing and the 30-day processing standards, timeliness of recertification actions, and other metrics, as determined by the Secretary, that may be relevant to the State agency’s implementation of photo EBT cards.

(2) *Function of issuance*. The photo EBT card option is a function of issuance and not a condition of eligibility. Any implementation of the option to place a photo on the EBT card must not impact the certification of households. An application will be considered complete with or without a photo and a case shall be certified regardless of the status of a photo in accordance with timeframes established under 7 CFR 273.2. If a State agency chooses to implement a voluntary photo EBT card policy, issuance shall not be impacted. If a State agency chooses to implement a mandatory photo EBT card policy, a State



agency may not deny or terminate a household because a household member who is exempted by paragraph (f)(4) of this section does not comply with the requirement to place a photo on the EBT card.

(3) *Mandatory vs. voluntary.* (i) State agencies shall have the option to implement a photo on EBT cards on a mandatory or voluntary basis. Regardless of whether the photo is mandatory or voluntary, the certification process must not be altered in order to facilitate photos, and clients must be informed that certification will not be impacted by whether or not a photo is on the card.

(ii) Under mandatory implementation, State agencies must exempt certain clients, as stated in paragraph (f)(4) of this section. State agencies must establish which member(s) of the household would be required to be photographed and the procedures that allow eligible nonexempt household members who do not agree to the photo to come into compliance at a later time.

(iii) Under voluntary implementation, clients must be clearly informed of the voluntary nature of the option. All applicant members of households, whether or not they are in an exempted category, must opt in to have a photo on their EBT card. States shall not require a photo be taken if the State is implementing a voluntary option.

(4) *Exemptions.* Under a mandatory implementation, the State agency must exempt, at a minimum, the elderly, the disabled, children under 18, homeless households, and victims of domestic violence. A victim of domestic violence shall be able to self-attest and cannot be required to submit documentation to prove domestic violence. The ability to self-attest must be applied equally regardless of if the victim is a female or male. Non-applicants

cannot have a photo taken for an EBT card whether or not they desire to have their photo taken. A State agency may establish additional exempted categories.

(5) *Serving clients with hardship.* State agencies must have sufficient capacity to issue photo EBT cards and a process or procedure in place to address, on a case-by-case basis, household hardship situations as determined by the State agency so that such household benefits are not unduly withheld. Examples of hardship conditions include, but are not limited to: Illness, transportation difficulties, care of a household member, hardships due to residency in a rural area, prolonged severe weather, or work or training hours which prevent the household from being available during the hours that photos are taken in-office. These are households that do not already fall under the mandatory exemptions or other exemptions established by the State under paragraph (f)(4) of this section .

(6) *Issuance of photo EBT card.* (i) States can require households to come in to be photographed, but cannot do so for the purposes of certification. The amount of time provided to households to come in and be photographed needs to be sufficient and reasonable and be documented in the Implementation Plan as required in paragraph (f)(14) of this section.

(ii) Regardless of whether the State's photo EBT card policy is voluntary or mandatory, if a household meets expedited criteria, the State must issue the EBT card without a photo and provide the full benefit allotment to the entire household without delay. The State agency may require a nonexempt head of household member to comply at the next recertification.

- (iii) Card issuance procedures for new SNAP households must ensure adherence to application processing standards as required at 7 CFR 273.2(g) and (i) and benefit issuance standards at § 274.2(b).
- (iv) State agencies shall not store photos that are collected in conjunction with its photo EBT card policy but are not placed on an EBT card.
- (v) The process for issuing and activating photo EBT cards must not disrupt, inhibit or delay access to benefits nor cause a gap in access for ongoing benefits for eligible households.
- (vi) Any card issued as part of the implementation of the photo EBT card option may not count against the household with respect to card replacement fees or the card replacement threshold defined in § 274.6(b).
- (7) *Prorating household benefits when photo EBT cards are mandatory.* For multi-person households, State agencies shall not withhold benefits for an entire household because nonexempt household members do not comply with the photo EBT card policy. If benefits of the nonexempt household member(s) are to be withheld, a prorated share of benefits shall be issued to the household member(s) that are in compliance with or are exempt from the photo requirement. For example, if there are four household members and one household member is not in compliance with the photo requirement, 3/4 of the household's monthly benefit allotment must be issued, and 1/4 of the benefit allotment must be held in abeyance and allowed to accrue until the household member complies. For a single person household, the State agency would hold all the benefits in abeyance until the household complies.

(8) *Benefits held for noncompliance.* Benefits held for noncompliance with the photo EBT card requirement must be withheld from issuance in accordance with paragraph (f)(7) of this section. Benefits withheld for noncompliance shall not remain authorized for perpetuity, and States must treat such benefits in accordance with the same timeframe used for handling expungements under § 274.2(h)(2). If the noncompliant member comes into compliance, the non-expired benefits must be issued within two business days of when the State agency obtains the client photo. Any action to withhold benefits from issuance is subject to fair hearings in accordance with 7 CFR 273.15.

(9) *Household and authorized representative card usage.* The State agency must establish procedures to ensure that all appropriate household members and authorized representatives (including individuals permitted by the household to purchase food or meals on their behalf, as provided for in 7 CFR 273.2(n)(3) and § 274.7(a)), can access SNAP benefits for the household regardless of who is pictured on the card or if there is no picture. States shall not require households to notify or provide the State information regarding individuals making purchases permitted by the household on an ad-hoc basis.

(10) *Client and staff training.* State agencies must ensure staff and clients are properly trained on photo EBT card requirements. At a minimum, this training shall include: Whether the State option is voluntary or mandatory, who must comply with the photo requirement, which household members are exempt, and that all appropriate household members and authorized representatives (including individuals permitted by the household to purchase food or meals on its behalf) are able to use the card regardless of who is pictured on the card or if there is no picture.

(i) All staff and client training materials must clearly describe the following statutory and regulatory requirements:

(A) Retailers must allow all appropriate household members and authorized representatives (including individuals permitted by the household to purchase food or meals on its behalf), regardless of whether they are pictured on the card, to utilize the card without having to submit additional verification of identity as long as the transaction is secured by the use of the PIN;

(B) EBT cards with or without a photo are valid in any State; and

(C) Retailers must treat all SNAP clients in the same manner as non-SNAP clients;

(ii) State agencies may not specifically reference which categories of individuals are exempt from the photo EBT requirement in any materials to retailers.

(11) *Retailer education and responsibility.* State agencies must conduct sufficient education of retailers if photos are used on cards. The State agency must clearly inform all retailers in the State and contiguous areas of implementation. State agency communications with retailers must clearly state:

(i) All household members and authorized representatives (including individuals permitted by the household to purchase food or meals on its behalf) are entitled to use the EBT card regardless of the picture on the card if the EBT card is presented with the valid PIN;

(ii) Retailers must treat all SNAP clients in the same manner as non-SNAP clients in accordance with 7 CFR 278.2(b);

(iii) Retailers must not prohibit individuals who have a EBT card and valid PIN, including but not limited to authorized representatives (including individuals permitted

by the household to purchase food or meals on its behalf), from using an EBT card because they are not pictured on the card or there is no picture on the card;

(iv) EBT cards from any State are valid with or without a photo.

(12) *Interoperability*. Interoperability of EBT cards will remain the same regardless of whether or not there is a photo and regardless of which State issued the card. State agencies must conduct sufficient education of clients and retailers, including retailers in contiguous areas, to inform them that the photo EBT cards remain interoperable and authorized retailers must accept EBT cards from all States as long as the user has a valid PIN.

(13) *Advance Planning Document*. Appropriate implementation and administration of the photo EBT card consistent with all applicable requirements is an allowable State administrative cost that FNS shall reimburse at 50 percent in accordance with 7 CFR part 277. Increased costs related to placing photos on the EBT card, whether contractual or produced from other sources, require an Implementation Advance Planning Document Update.

(14) *Implementation Plan*. (i) State agencies must submit an Implementation Plan for approval prior to implementation that delineates how the State agency will operationalize the photo EBT option. FNS shall review the plan and issue an approval, request modifications prior to granting approval or issue an approval subject to conditions. In cases where FNS finds that the steps outlined in the Implementation Plan are not sufficient for a successful implementation, FNS may deny the Implementation Plan or issue an approval subject to conditions, such as requiring the State agency to implement a successful pilot in a selected region of the State before a statewide implementation.

Should a State be required to implement a pilot before statewide implementation, that requirement would be documented in the State's Implementation Plan approval, along with any information the State must report to FNS before expansion approval would be provided by FNS.

(ii) State agencies must demonstrate successful administration of SNAP based on SNAP performance standards as established in paragraph (f)(1) of this section. State agencies shall not issue EBT cards with photos before the State's Implementation Plan is approved and the State agency has also received FNS authorization to proceed to issue photo EBT cards.

(iii) The Implementation Plan shall include but not be limited to:

(A) A description of card issuance procedures;

(B) The text required at paragraph (b)(5)(ii) of this section;

(C) A detailed description of how client protections and ability to use SNAP benefits will be preserved;

(D) Specific information about exempted recipients, the State agency's exemption criteria, and how it will address the needs of household members with hardships;

(E) A description of how the State agency will obtain photographs for the EBT card;

(F) The procedures for opting into a voluntary photo EBT card policy and how the State agency will document that a household voluntarily chose to have a photo on its EBT card;

(G) Training materials and training plans for State agency staff;

(H) A description of any planned stakeholder assistance with implementation;

(I) Communication plans for informing clients, retailers and other stakeholders of the State agency's photo EBT card policy, including copies of letters and other materials communicating the policy to clients, retailers, and other stakeholders. Communication plans must describe compliance with language requirements at 7 CFR 272.4(b);

(J) A timeline for the implementation; and

(K) Draft memoranda of understanding if the State agency plans to share SNAP client data in accordance with 7 CFR 272.1(c) for purposes of implementing its photo EBT card option. The memoranda of understanding must state how any information collected will be securely stored and that the information can only be shared for the purpose of SNAP in accordance with 7 CFR 272.1(c).

(iv) The Implementation Plan shall also address the anticipated timetable with specific action steps for the State agency and contractors, if any, that may be involved regarding implementation of the photo EBT card option, the State agency's capacity to issue photo EBT cards, and the logistics that shall allow for activation of the photo EBT card simultaneously or followed by deactivation of the active non-photo EBT card. This shall also include the description of the capacity at the facility where the photo EBT cards will be produced, both for transition and ongoing production, and confirmation that the State agency and any contractor will continue to meet regulatory time requirements for all EBT card issuances and replacements, including for expedited households. The Implementation Plan must also include indicators related to the photo EBT card implementation that the State will collect and analyze for the post implementation evaluation required by paragraph (f)(16) of this section in addition to the State's approach for continued oversight, which may include activities as such as the use of test shoppers.



(v) The State agency shall provide all applicable proposed written policy for staff to implement the photo EBT card option to FNS for review. State agencies shall include copies of all materials that will be used to inform clients, retailers and other stakeholders regarding photo EBT card implementation. In addition, the State agencies shall provide a detailed description of how the notifications, communication, policies, and procedures regarding the implementation of any new photo EBT card option will comply with applicable civil rights laws specified at 7 CFR 272.4(b) and 272.6(a).

(vi) The State agency's Implementation Plan shall also include:

- (A) An education component for retailers and clients to ensure all eligible household members and authorized representatives (including individuals permitted by the household to purchase food or meals on their behalf) are able to use the EBT card, and understand the timeframes associated with the implementation and rollout,
- (B) A description of the resources that will be in place to handle comments, questions and complaints from clients, retailers, and external stakeholders, and
- (C) A description of procedures to address unexpected events related to the photo EBT card option.

(vii) Upon approval of the Implementation Plan by FNS, the State may proceed with tasks described in the Implementation Plan, as modified by the approval, but may not proceed to issuing actual cards until it receives FNS authorization to do so. FNS may also require the State to implement in a phased manner, which may include criteria as determined by the Secretary.

(15) *Authorization to issue photo EBT cards.* States agencies shall not be permitted to issue EBT cards with photos until FNS provides an explicit authorization to issue photo

EBT cards. After an Implementation Plan is approved, FNS will review the State agency's actions at an appropriate time interval to ensure that the process and steps outlined by the State agency in the Implementation Plan are fulfilled. In cases where the State agency has not acted consistently with the process and steps outlined in its photo EBT card Implementation Plan, FNS may deny authorization for the State agency to issue EBT cards with photos until the State agency has done so successfully.

(16) *Post implementation assessment and evaluation.* State agencies must submit to FNS a post-implementation assessment that provides FNS with a report of the results of its implementation, including any issues that arose and how they were resolved, the degree to which State agency staff, clients and retailers properly understood and implemented the new provisions.

(i) This report shall be delivered to FNS within 120 days of implementation. This report shall cover the first 90 days of implementation. The Department also reserves the right to conduct its own review of the State agency's implementation. The State agency's post-implementation report shall include at a minimum:

(A) A survey of clients conducted by an independent evaluator to demonstrate the clients' clear understanding of the State agency's photo EBT policy;

(B) A survey of retailers conducted by an independent evaluator that demonstrates evidence that at least 80 percent of retailers, including smaller independent retailers, demonstrate a full understanding of the policies related to the photo EBT card, which may include the use of test shoppers;

(C) The amount and percent of benefits held for noncompliance if mandatory;

(D) The number and percent of households with photo EBT cards;

- (E) The number of households affected by withholding for noncompliance, if mandatory;
- (F) The number and percent of households exempt from the photo EBT card requirement if mandatory;
- (G) The number and percent of exempted households who opted for photo EBT cards if mandatory;
- (H) The number and scope of complaints related to the implementation of the policy;
- (I) The State agency's Case and Procedural Error Rate; and
- (J) SNAP performance metrics as established in paragraph (f)(1) of this section and other SNAP performance metrics that may have been adversely affected by the implementation of the State agency's photo EBT card option, as determined by the Secretary.

(ii) [Reserved]

(17) *Ongoing monitoring.* FNS will continue to monitor and evaluate the operation of the option. State agencies shall provide FNS additional information upon request or as may be required by other guidelines established by the Secretary to conduct such evaluations.

(18) *Modifying implementation of photo EBT card option.* If any review or evaluation of a State's operations, including photo EBT operation implementation, finds deficiencies, FNS may require a corrective action plan consistent with 7 CFR 275.16 to reduce or eliminate deficiencies. If a State does not take appropriate actions to address the deficiencies, FNS would consider possible actions such as requiring an updated photo EBT Implementation Plan, suspension of the photo EBT policy and/or withholding funds in accordance with 7 CFR 276.4.

## **PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE**

## FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

6. In § 278.2, revise paragraph (h) and remove and reserve paragraphs (i) and (k).

The revision reads as follows:

### **§ 278.2 Participation of retail food stores.**

\* \* \* \* \*

(h) *Identifying benefit users.* Retailers must accept payment from EBT cardholders who have a valid PIN regardless of which State the card is from or whether the individual is pictured on the card. Where photo EBT cards are in use, the person presenting the photo EBT card need not be pictured on the card, nor does the individual's name need to match the one on the card if the State includes names on the card. However, benefits may not knowingly be accepted from persons who have no right to possession of benefits. If fraud is suspected, retailers shall report the individual to the USDA OIG Fraud Hotline.

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Dated: December 7, 2016.

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Audrey Rowe  
Acting Under Secretary for Food, Nutrition,  
and Consumer Services  
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